

**United States District Court**

For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11	ENRIQUE DIAZ,	)	No. C 14-03111 EJD (PR)
12	Plaintiff,	)	ORDER OF SERVICE; DIRECTING
13	v.	)	DEFENDANTS TO FILE
14	M. PEREZ, et al.,	)	DISPOSITIVE MOTION OR
15	Defendants.	)	NOTICE REGARDING SUCH
16		_____ )	MOTION; INSTRUCTIONS TO
17		)	CLERK

18 Plaintiff, a state prisoner at Salinas Valley State Prison (“SVSP”), filed the  
19 instant civil rights action in pro se pursuant to 42 U.S.C. § 1983, against SVSP  
20 prison officials. Plaintiff’s motion for leave to proceed in forma pauperis will be  
21 granted in a separate order.

**DISCUSSION****A. Standard of Review**

25 A federal court must conduct a preliminary screening in any case in which a  
26 prisoner seeks redress from a governmental entity or officer or employee of a  
27 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must  
28 identify any cognizable claims and dismiss any claims that are frivolous, malicious,

fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

#### B. Plaintiff's Claims

Plaintiff claims that Defendant M. Perez "falsified/fabricated" a rule violation report ("RVR") on November 11, 2011, and charged Plaintiff with possession of dangerous contraband, following a cell search on November 3, 2011. (Compl. at 3.) Plaintiff claims that Defendant R. A. Kessler found him guilty of the false charge, after denying Plaintiff's request for witnesses. (Id. at A-4.) Plaintiff was assessed 30 days of forfeiture of credits, segregated for 60 days in his cell, and loss of privileges. (Id.) After a series of appeals and rehearings, Plaintiff claims that the RVR was invalidated and the credit forfeitures were restored. Liberally construed, Plaintiff states a cognizable due process claim, see Wolff v. McDonnell, 418 U.S. 539, 556 (1974), which, if successful, may entitle him to compensatory damages or at least nominal damages. See Raditch v. United States, 929 F.2d 478, 481 n.5 (9th Cir. 1991) (citing Carey v. Piphus, 435 U.S. 247, 266-67 (1978); Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 781 (9th Cir. 1982)).

#### CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint, all attachments thereto, and a copy of this order upon

United States District Court

For the Northern District of California

1       **Defendants M. Perez, Lt. R. A Kessler, Cpt. R. Binkele, B. Hedrick, Jr. J.**  
2       **Stevenson, Cpt. V. Solis, Lt. R. L. Martinez, and Cpt. J. J. Hughes** at the **Salinas**  
3       **Valley State Prison** (P.O. Box 1020, Soledad, CA 93960-1020). The Clerk shall  
4       also mail a copy of this Order to Plaintiff.

5           2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
6       Procedure requires them to cooperate in saving unnecessary costs of service of the  
7       summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified  
8       of this action and asked by the Court, on behalf of Plaintiff, to waive service of the  
9       summons, fail to do so, they will be required to bear the cost of such service unless  
10      good cause shown for their failure to sign and return the waiver form. If service is  
11      waived, this action will proceed as if Defendants had been served on the date that  
12      the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be  
13      required to serve and file an answer before **sixty (60) days** from the day on which  
14      the request for waiver was sent. (This allows a longer time to respond than would be  
15      required if formal service of summons is necessary.) Defendants are asked to read  
16      the statement set forth at the foot of the waiver form that more completely describes  
17      the duties of the parties with regard to waiver of service of the summons. If service  
18      is waived after the date provided in the Notice but before Defendants have been  
19      personally served, the Answer shall be due **sixty (60) days** from the date on which  
20      the request for waiver was sent or **twenty (20) days** from the date the waiver form is  
21      filed, whichever is later.

22           3. No later than **ninety (90) days** from the date of this order, Defendants  
23      shall file a motion for summary judgment or other dispositive motion with respect to  
24      the claims in the complaint found to be cognizable above.

25           a. If Defendants elect to file a motion to dismiss on the grounds  
26      Plaintiff failed to exhaust his available administrative remedies as required by 42  
27      U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion  
28      pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied

**United States District Court**

For the Northern District of California

1       **Alameida v. Terhune, 540 U.S. 810 (2003). The Ninth Circuit has held that**  
 2       **Plaintiff must be provided with the appropriate warning and notice under**  
 3       **Wyatt concurrently with Defendants' motion to dismiss. See Woods v. Carey,**  
 4       **Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012).**

5                 b.       Any motion for summary judgment shall be supported by  
 6       adequate factual documentation and shall conform in all respects to Rule 56 of the  
 7       Federal Rules of Civil Procedure. Defendants are advised that summary judgment  
 8       cannot be granted, nor qualified immunity found, if material facts are in dispute. If  
 9       any Defendant is of the opinion that this case cannot be resolved by summary  
 10      judgment, he shall so inform the Court prior to the date the summary judgment  
 11      motion is due.

12                 4.       Plaintiff's opposition to the dispositive motion shall be filed with the  
 13      Court and served on Defendants no later than **twenty-eight (28) days** from the date  
 14      Defendants' motion is filed.

15                 a.       **In the event Defendants file a motion for summary**  
 16       **judgment, the Ninth Circuit has held that Plaintiff must be concurrently**  
 17       **provided the appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963**  
 18       **(9th Cir. 1998) (en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at**  
 19       **7874.**

20       Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil  
 21      Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party  
 22      opposing summary judgment must come forward with evidence showing triable  
 23      issues of material fact on every essential element of his claim). Plaintiff is cautioned  
 24      that failure to file an opposition to Defendants' motion for summary judgment may  
 25      be deemed to be a consent by Plaintiff to the granting of the motion, and granting of  
 26      judgment against Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54  
 27      (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

28                 5.       Defendants shall file a reply brief no later than **fourteen (14) days**

United States District Court  
For the Northern District of California

1 after Plaintiff's opposition is filed.

2       6. The motion shall be deemed submitted as of the date the reply brief is  
3 due. No hearing will be held on the motion unless the Court so orders at a later date.

4       7. All communications by the Plaintiff with the Court must be served on  
5 Defendants, or Defendants' counsel once counsel has been designated, by mailing a  
6 true copy of the document to Defendants or Defendants' counsel.

7       8. Discovery may be taken in accordance with the Federal Rules of Civil  
8 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
9 Local Rule 16-1 is required before the parties may conduct discovery.

10      9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must  
11 keep the court informed of any change of address and must comply with the court's  
12 orders in a timely fashion. Failure to do so may result in the dismissal of this action  
13 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14      10. Extensions of time must be filed no later than the deadline sought to be  
15 extended and must be accompanied by a showing of good cause.

16  
17 DATED: 11/26/2014

  
EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ENRIQUE DIAZ,

Case Number: CV14-03111 EJD

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

M. PEREZ, et al.,

Defendants.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 12/1/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Enrique Diaz K-70268  
Salinas Valley State Prison  
P.O. Box 1050  
Soledad, CA 93960

Dated: 12/1/2014

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk